IN THE

Supreme Court of the United States

No. 71-1082

REUBIN O'D ASKEW, et al.,
Appellants,
against
THE AMERICAN WATERWAYS OPERATORS, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF CONNECTICUT AND DELAWARE, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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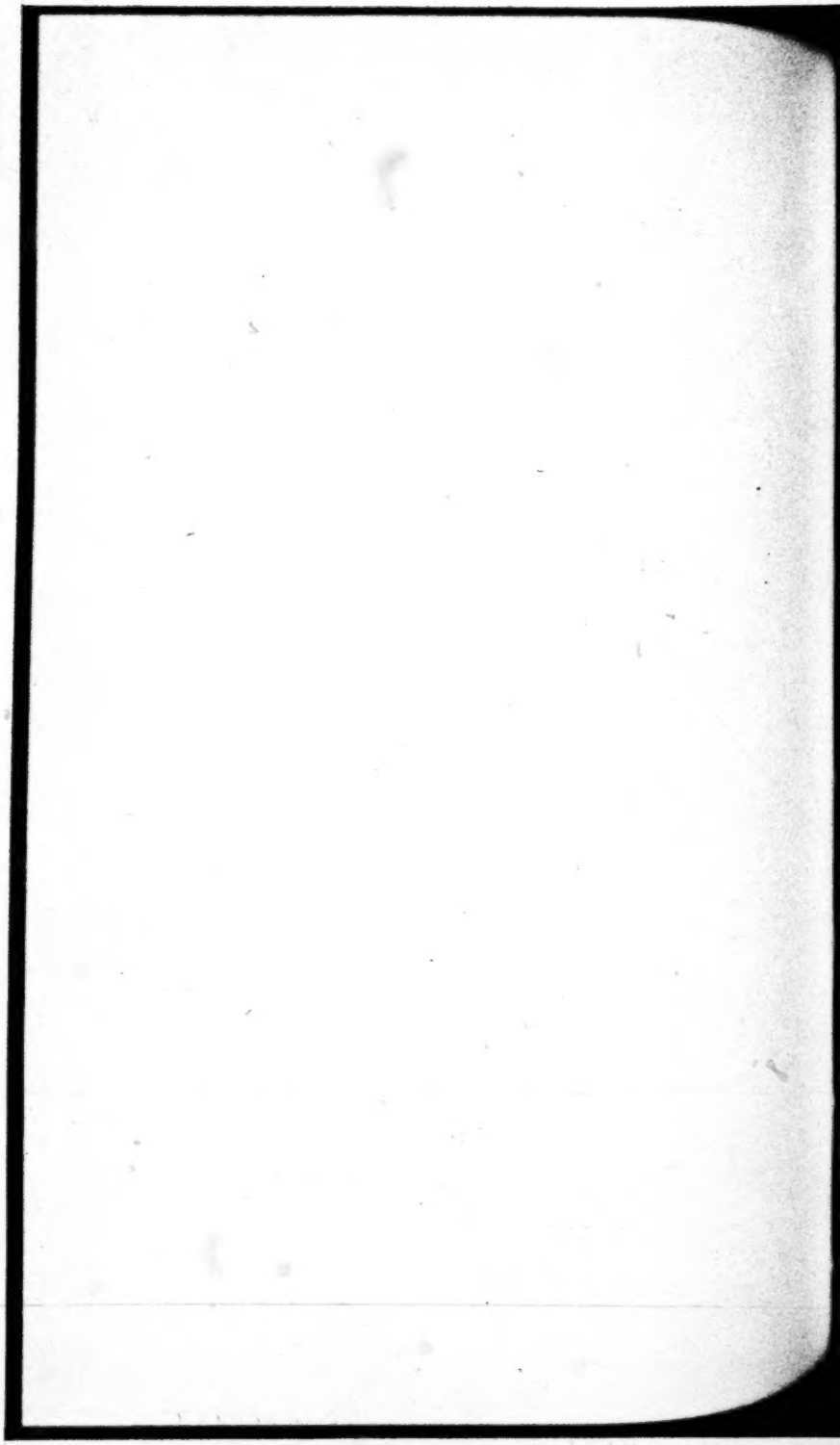

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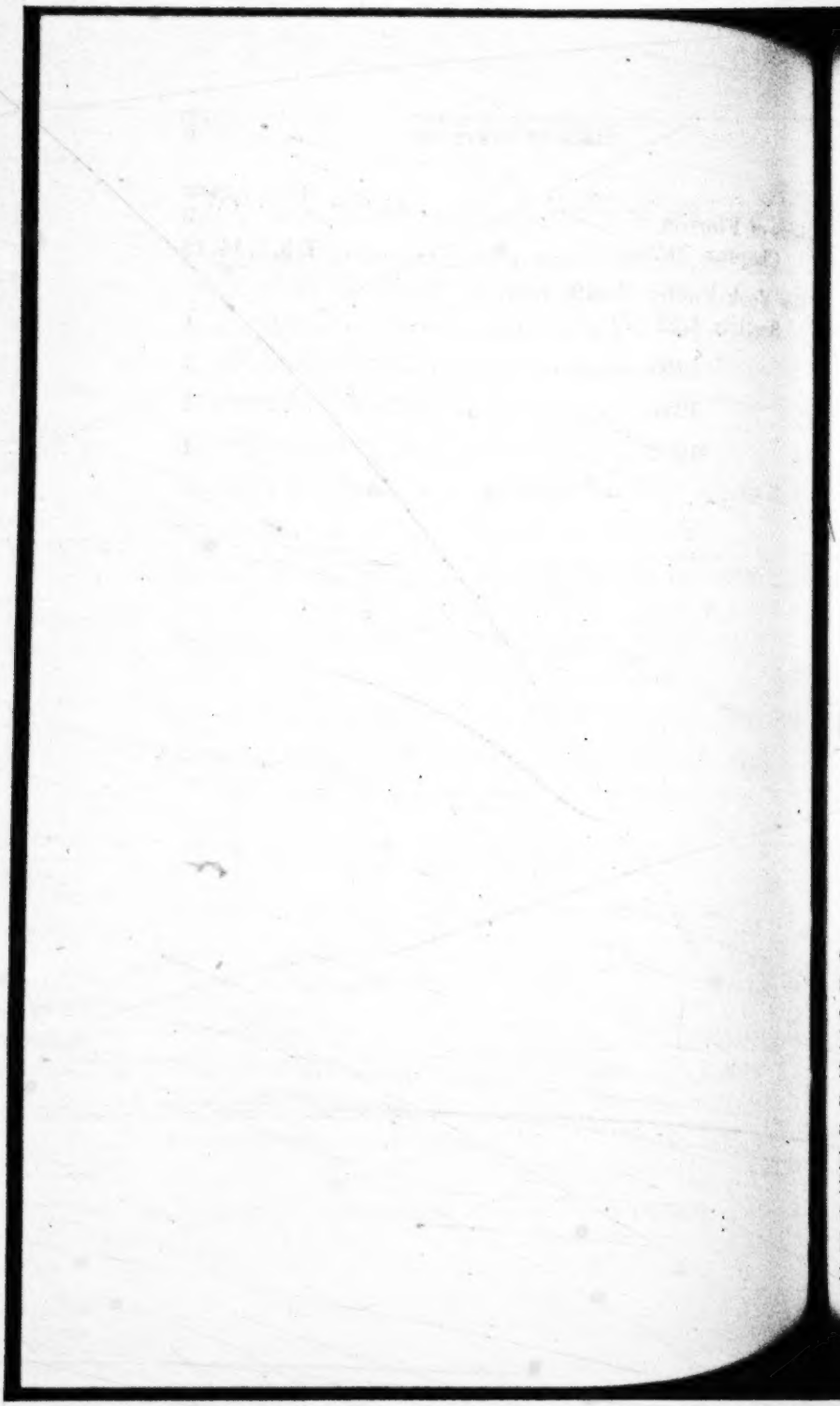

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Interest of the *Amicus*

The State of New York has long been a leader in the enactment of legislation designed to protect the health, safety, and welfare of its citizens from the harmful effects of pollution. Section 1221(2) of the New York Public Health Law prohibits the discharge of oil and other specified pollutants into the territorial waters of New York, and in §§ 1250, 1251 and 1252, civil and criminal penalties are imposed for such a violation. At present legislation is pending in New York which would impose absolute liability on those responsible for the discharge of oil into the territorial waters of the State. This proposed legislation has certain similarities with Chapter 70-244, Laws of Florida, 1970, the statute under consideration here.

The devastating and long-lasting damage to beaches, harbors and coastal wetlands wrought by oil spills has been demonstrated all too frequently in recent years and is now a matter of which judicial notice may be taken. Substantial damage has been done to the coastal waters of New York, in Long Island Sound and elsewhere, by the spillage of large quantities of oil from tankers and other sources. Future damage threatens to be more widespread, especially if leases for oil drilling along the Atlantic seaboard on the Outer Continental Shelf are granted. Such leases are now being considered. The severe effects of such oil pollution on coastal lands, fisheries and waterfowl have already been demonstrated in the Santa Barbara Channel and the Gulf of Mexico, and it is our position that the states, under the ample authority of their police powers, may prohibit oil pollution of the coastal waters within their territorial jurisdiction just as they may prohibit the discharge of other hazardous and polluting substances into their air and waters.

Because of New York's vital concern with the preservation and protection of its waters and coastal lands, and in view of the State's interest in enacting legislation to impose strict liability on oil spills within New York's territorial waters, New York views the outcome of this litigation with deep interest. We are concerned with the effect that appellees' challenge to the Florida Act, if successful, might have on New York's efforts to protect its shoreline and coastal waters, and the environmental and economic interests represented therein, from one of the most harmful forms of pollution known to man—oil pollution. The decision in this litigation may therefore have a substantial effect on the health, safety, welfare, and legal rights of the citizens of New York State and our sister states. Indeed, a determination that the coastal states are without power to protect their territory from this hazard would deal a debilitating blow to their efforts to protect their environment from this most virulent form of pollution.

ARGUMENT

Chapter 70-244 of the Laws of Florida, 1970, is a valid exercise of the State's police power to protect its natural resources and the health and livelihood of its citizens. It does not unconstitutionally interfere with Federal admiralty or maritime jurisdiction, nor does it operate in a field preempted by Congress.

A.

The nature of the Florida statute

The Court below erred grievously in treating this statute as an "unlawful intrusion into the exclusive federal admiralty domain" (App. p. 42). That amounted to a distortion of the act, which is directed at the pollution of beaches, shoreline and coastal waters caused by spills of oil and other viscous liquids—not at navigation or admiralty. The act prohibits such discharges into the beaches and coastal waters of Florida (Ch. 70-244, Section 4), licenses terminal facilities (refineries, oil storage tanks, and the like), and imposes strict liability on oil spills within the state's boundaries, whether from terminal facilities or from vessels. The regulation of these fundamental areas is within the very core of the state's police power, which extends to all the great public needs, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, including the protection of the state's coastlines, beaches, fisheries, shellfish and territorial waters, and the natural resources contained therein, from irreparable damage caused by the discharge of oil into said waters. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (smoke control); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (dredging and excavating). Ever since the historic *Slaughter-House Cases*, 83 U.S. 81, it has been universally recognized that the states may take reasonable steps to regulate private industry so as to prevent occurrences dangerous to the public health.

The courts have consistently upheld the right of states to protect their fisheries within their territorial waters, as does the Florida statute challenged here. See, *e.g.*, *Mirkovich* v. *Milnor*, 34 F. Supp. 409 (N.D. Cal. 1940); *State* v. *Ruvido*, 15 A. 2d 293, 137 Me. 327 (1940); *In re Marincovich*, 192 Pac. 156, 48 Cal. App. 474 (1920); *Santa Cruz Oil Corp.* v. *Milnor*, 130 P. 2d 256, 55 Cal. App. 2d 56 (1942); *Commonwealth* v. *Manchester*, 25 N.E. 113, 152 Mass. 230 (1890); See also *Skiriotes* v. *Florida*, 313 U.S. 69. These decisions unequivocally hold that the states have the right to legislate to protect their fisheries and other resources in their territorial waters. The authority of the states to license and regulate commercial fishing within the three-mile limit has been repeatedly upheld as a valid exercise of the police power of the state. In view of the serious danger to public health and natural resources posed by pollution resulting from oil spills—pollution of watercourses, killing of fish and shellfish, pollution of shellfish beds, and destruction of beaches and coastal wetlands—it would be anomalous indeed were this Court to sustain the states' authority over fishing while denying the states power to control oil spills which have the capability to destroy fisheries and shellfish grounds for years.

The minimum extent of the states' territorial jurisdiction is delineated by the Submerged Lands Act of 1953, 43 U.S.C. § 1311, which codifies the states' exclusive jurisdiction over submerged lands from the shoreline to the three-mile limit.* The effect of the amazing and regressive decision of the District Court, however, would be to completely divest the states of their legal rights to safeguard their own territorial waters within the three-mile limit and the health of their citizens.

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* It is the position of New York as well as Florida and the other Atlantic coastal states that their jurisdiction in fact extends to the outer limit of the Continental Shelf. See *United States* v. *Maine*, Orig. No. 35, presently pending before this Court. That issue is not before the Court in this case.

The statute is a valid exercise of the police power

The decision below in an unprecedented and anachronistic way undercuts the states' authority to protect their very shores from pollution. In the exercise of its police power, the states may act, in maritime and interstate commerce activities, concurrently with the Federal government, except in fields preempted by Congress. In *Huron Portland Cement Co.* v. *City of Detroit, supra,* 362 U.S. 440, this Court upheld a local Smoke Abatement Code that applied to ships' boiler stacks, even though the boilers had already been inspected and licensed by the federal government. At 442 this Court noted:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the Federal Government."

We have progressed far beyond the era when the Federal government's jurisdiction over maritime and interstate commerce activities, like the due process clause, was used to strike down state health and sanitary regulations, factory inspections, and safety regulations for transportation and industry. *Ferguson* v. *Skrupa,* 372 U.S. 726, 729-732; *Huron Portland Cement Co.* v. *City of Detroit, supra,* 362 U.S. at 448. See also *Albina Engine & Machine Works, Inc.* v. *Hershey Chocolate Corp.,* 295 F. 2d 619, 622 (9th Cir. 1961) (upholding city regulation of welding and burning aboard ships). As long ago as *Morgan's Steamship Company* v. *Louisiana Board of Health,* 118 U.S. 455, this Court upheld the right of Louisiana to protect its residents from cholera, yellow fever, and other diseases by requiring

all vessels entering New Orleans to submit to a health inspection and the payment of an inspection fee. And since "[t]he police power of the State is the least limitable of all the powers of government" (*Matter of Engelsher* v. *Jacobs*, 157 N.E. 2d 626, 627, 5 N.Y. 2d 370 [1959], cert. den. 360 U.S. 902), it has been held, as this Court pointed out in *Huron Portland Cement Co.* v. *City of Detroit*, *supra*, 362 U.S. at 447-448:

> "[A] federally licensed vessel is not, as such, exempt from local pilotage laws, *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, or local quarantine laws, *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U.S. 455, or local safety inspections, *Kelly* v. *Washington*, 302 U.S. 1, or the local regulation of wharves and docks, *Packet Co.* v. *Catlettsburg*, 105 U.S. 559. Indeed, this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade.' *Smith* v. *Maryland*, 18 How. 71, 74. The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

Here, this language is even more apt. The Florida statute requires only that oil and gas drilling, storage and refinery facilities, as well as vessels traversing the territorial waters of the State, should assume full responsibility for any damage they may cause to the fisheries and other resources of the people of the state and that such terminal facilities and vessels be adequately insured to that end. The Florida law does not destroy the right of free pas-

sage or exclude any licensed vessels from the ports of Florida so long as the vessels comply with the minimum safety requirements enacted to protect the state's citizens from the devastation of oil spills.

In *Kelly* v. *Washington*, 302 U.S. 1, where this Court upheld the right of that State to require a safety inspection of all tug-boats plying its navigable waters, the Court held (at p. 14):

> "When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess."

The catastrophic public health, environmental and economic effects of unregulated oil spills on the victimized state and its citizens render this reasoning and holding equally applicable here.

The Court below disregarded the plain wording of the statute, which by its terms deals not only—or even primarily—with navigation, but with prohibiting "[t]he discharge of oil, petroleum products, their by-products, and other pollutants into or upon any coastal waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state * * *" (Ch. 70-244, § 4). The act goes on to license terminal facilities, defined as waterfront facilities "other than vessels not owned or operated by such facility," used to drill, pump, store or refine oil (*id.* §§ 3[9], 6[1]). The provisions prohibiting discharge of pollutants and imposing liability therefor are applicable to terminal facilities as well as to vessels. Liability is

incurred only where pollutants are discharged into or upon the lands or coastal waters of the state (*id.* § 4), and the "powers and duties" of the State's agents are expressly limited "to the boundaries of the state" (*id.* § 5[2]). The entire thrust of the act is not to regulate navigation or commerce but to protect against oil spills and other unlawful discharges of pollutants, from terminal facilities as much as from vessels. To adopt the view that the states are powerless to so protect their beaches, harbors and fisheries would be tantamount to holding them forbidden by the clause forbidding undue burdens on interstate commerce to regulate safety on their highways and streets. See *Chrysler Corp.* v. *Tofany*, 419 F. 2d 499 (2d Cir. 1969) (upholding state regulation of auto headlights); *Brotherhood of L. Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U.S. 129 (full-crew laws); *Maner* v. *Hamilton*, 309 U.S. 598 (state regulation of truck weights).

And as the Court held in *Chrysler Corp.* v. *Tofany*, *supra*, 419 F. 2d at 511, "it is well-settled that where the state's police power is involved, preemption will not be presumed."

In *Terminal Railroad Assn. of St. Louis* v. *Brotherhood of R. Trainmen*, 318 U.S. 1, 6-7, this Court held, with striking applicability to the case at bar:

> "State laws have long regulated a great variety of conditions in transportation and industry, safety devices and protections, purity of water supply, fire protection, and innumerable others. * * * [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation."

In the closely comparable field of pilotage, this Court has consistently sustained State regulatory legislation as

within the police power. *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187; *Cooley* v. *Board of Wardens*, 53 U.S. 299. The considerations of protection of the state's health and resources here are at least equally powerful.

The alleged interference with Federal maritime jurisdiction

The admiralty and maritime jurisdiction of the Federal government has never been inflated so as to paralyze the states from enforcing laws to prevent the pollution of their lands and coastal waters or to protect the health of their citizens. *Huron Portland Cement Co.* v. *City of Detroit, supra,* and *Kelly* v. *Washington, supra,* both make it crystal clear that state health and safety regulations otherwise valid under the police power will not be overturned on that ground. See also *New York State Waterways Assn.* v. *Diamond,* —— F. Supp. —— (W.D.N.Y., BURKE, J., decided Jan. 12, 1971)*, upholding New York's Navigation Law provisions against discharge of sewage from vessels as against a similar claim.

Indeed, the District Court, under well-established principles, should have abstained from reaching these issues at all prior to affording the state courts an opportunity to pass on the statute, since it is possible the Florida courts might construe it so as to avoid some or all of the issues here raised. *Lake Carriers' Assn.* v. *MacMullan,* 40 L.W. 4569, 4573.

The Court below placed great reliance on the Water Quality Improvement Act of 1970 (33 U.S.C. §1161) as "tangible evidence that the Florida Act is an unconstitutional intrusion" (App. p. 41). But this is belied by the terms of the Federal act itself. Section 1161(e) of the Act expressly provides that the Federal statute shall not be construed to preempt the right of a state to impose

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*A copy of that decision is annexed hereto as an appendix to this brief at pp. 20-23.

"any other requirement or liability" with respect to the discharge of oil into the territorial waters of the state. Congress, far from preempting the field, has actually invited the states to enact legislation to protect their own vital environmental and economic interests from the threat of oil pollution.

The Florida statute represents a reasonable effort by the State to protect its own waters from pollution. In the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq., in pari materia* with the 1970 Act, Congress specifically recited and reiterated the traditional powers and responsibilities of the states in this area (§ 1151[b]):

> "In connection with the exercise of jurisdiction over the waterways of the Nation • • •, it is declared to be the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, • • •."

Again (§ 1151[c]):

> "Nothing in this chapter shall be construed as impairing or in any manner affecting the right or jurisdiction of the States with respect to the waters • • • of such States."

And § 1160(b) provides:

> "State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not • • • be displaced by Federal enforcement action."

Since this Court has repeatedly held that federal preemption of the "historic police power of the States" will not be decreed "unless that was the clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331

U.S. 218, 230, it is clear that the Florida statute in issue must stand as a valid constitutional exercise of that state's inherent powers. See also *Department of Health* v. *Passaic Valley Sewage Commission*, 242 A. 2d 675, 679-680, 100 N.J. Super. 540 (1968), aff'd 253 A. 2d 577, 105 N.J. Super. 565:

> "[N]o legislation is extant which has whittled away the power of the State or its agency, the Department, so as to deprive the Department of jurisdiction over pollution prevention in the New Jersey waters of upper New York Bay • • •."

See also *Albina Engine and Machine Works, Inc.* v. *Hershey Chocolate Corp.*, 295 F. 2d 618, 622, *supra*:

> "We find no conflict nor any Federal intent in preventing the City of Portland from legislating in this area [regulation of welding or burning aboard ships] in which the City's interest so obviously appears."

Absent Congressional intent to create an exclusive system of regulation, the presumed validity of the Florida statute should be upheld. *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 406 (S.D.N.Y. 1964), cert. den. 385 U.S. 1036 (upholding State regulation of weights of fowl despite Federal Poultry Products Inspection Act). See also *Terminal R. Assn. of St. Louis* v. *Brotherhood of R. Trainmen*, *supra*, 318 U.S. 1, 7 (rejecting a claim that the Railway Labor Act preempted state laws regulating working conditions).

The Court below strangely insisted that the fact that the statute concerns itself with water pollution from, among other sources, vessels, in some way acted as a talisman to remove its subject-matter from the state's jurisdiction. But the fact that navigable waters are involved no more deprives the state of authority than does the fact that commerce is involved bar the states from regulating highways, or foodstuffs, or air pollution. This Court has, as we have shown, consistently rejected such arguments. The recent public concern over protection of the environment, coupled

with the advent of supertankers and the granting of leases for offshore oil drilling, has prompted legislation such as Florida's which concededly regulates, among other things, discharges from ships in its territorial waters. The legal footing of such legislation is as solid as is that supporting state regulation of emissions from motor vehicles or from factories engaged in interstate commerce.

The Water Quality Improvement Act does not preempt this field or divest the state of jurisdiction to protect its beaches and harbors

The District Court confusingly interwove the plaintiffs' claims of "interference with navigation" and of "preemption." This was symptomatic of its failure to properly weigh the state's profound interest in protection of its natural resources and economy as well as the health of its citizens. In fact the Court below ignored the powerful presumption of constitutionality of the statute, *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809, and stretched the language of the Water Quality Improvement Act in a seeming effort to create Federal preemption where none exists, and where Congress clearly expressed its intent that none exist.

In determining whether the Federal act preempted the entire field, the District Court should have commenced with the premise that only where the Federal and state acts inevitably collide, or where Congress has unmistakably expressed its intent to occupy the field, is preemption to be inferred. *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 142. Instead it sought out conflict where none exists, ignoring the host of recent cases in which, on comparable facts, this Court has rejected the claim of preemption. *Swift & Co.* v. *Wickham, supra,* 230 F. Supp. 398, 406, cert. den. 385 U.S. 1036 (upholding state poultry-weight regulations as against claim of preemption by Food & Drug Act); *A.E. Nettleton Co.* v. *Diamond,* 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. dism. *sub nom. Reptile*

Products Assn. v. *Diamond*, 401 U.S. 969 (upholding state endangered species legislation although broader than Federal law); *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), aff'd 440 F. 2d 1319, cert. den. 404 U.S. 983. See also *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, —— U.S., ——, 92 S. Ct. 1349; *Chrysler Corp.* v. *Tofany, supra*, 419 F. 2d 499. In the *Evansville Airport* case this Court aptly held that state departure taxes do not "conflict with any federal policies furthering uniform national regulation of air transportation. No federal statute or specific Congressional action or declaration evidences a Congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." 92 S. Ct. 1349, 1357.

The Federal act dovetails with rather than conflicts with the state law here. It sets forth as "the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States [or] adjoining shorelines" (33 U.S.C. § 1161[b][1])—the precise goal of the Florida statute. The Federal law repeatedly emphasizes cooperation with the states, as in the National Contingency Plan for removal of oil (*id.* § 1161[c][2]) ("assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, * * *").

Again, abatement action by United States attorneys is to be taken "[i]n addition to any other action taken by a State or local government" (*id.* § 1161[e]). And, most precisely on point here, the Federal act states (*id.* § 1161[o]):

> "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or

agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State. * * *"

Had Congress sought to deprive the states of authority in this area it would hardly have explicitly provided over and over again for state action.

The distinctions drawn by the Court below between the Water Quality Improvement Act and the state law (App. pp. 42-43) are inapposite for several reasons. In the first place the Florida act, like the Federal law, excuses oil spills caused by an act of God, an act of war or the fault of a third party. See § 11(6)(c), explicitly permitting the person determined to be liable to obtain reimbursement if the State finds the occurrence was the result of any of these events.*

And while the state act imposes liability for cleanup costs upon the polluter without the monetary ceiling created by the Federal statute, there is nothing in the Federal act which prohibits the states from going further than the limited liability set forth in § 1161(f). The same is true as to remedies for damage caused by discharges

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* Although the Court below made much of the provision of the Florida act that "[t]he findings of the department shall be conclusive" as to a claim for reimbursement in case of a non-negligent spill, this is a distinction without a difference. The courts have consistently read into such statutory language provision for judicial review to ensure against arbitrary action. See, e.g., *Oestereich* v. *Selective Service System*, 393 U.S. 233; *Gonzalez* v. *Freeman*, 334 F. 2d 570, 118 U.S. App. D.C. 180 (1964); *Matter of Guardian Life Ins. Co.* v. *Bohlinger*, 124 N.E. 2d 110, 308 N.Y. 174, 183 (1954), rearg. den. 125 N.E. 2d 867, 308 N.Y. 810.

aside from cleanup costs. As to this the Federal law is silent, leaving "undisturbed," in the language of the Court below (App. p. 42), the remedies the states make available. There is nothing in the Constitution or any Federal law which deprives a state of authority to provide for liability for damage occasioned by an oil spill without the necessity of proving negligence, so long as such liability is referable only to damage done within the borders of the state.

The District Court's heavy reliance on *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, was misplaced. In the first place that decision dealt with injuries on shipboard. The statute here attacked is addressed to damage resulting from oil spills from all sources—onshore facilities as well as ships. The lower court repeatedly treated this case as one involving navigation only.

Moreover, *Jensen*, a product of an earlier period in which the states' police power in the economic field was narrowly defined, and dealing with a field utterly alien to the case at bar and one in which entirely different considerations obtain, held that a state workmen's compensation law did not extend to injuries which occurred in navigable waters, even though there was then no equivalent Federal remedy. The *Jensen* decision, utterly inapplicable to the case at bar, was in any event severely sapped by *Davis* v. *Department of Labor*, 317 U.S. 249, reh. den. 317 U.S. 713, in which this Court held it constitutional to permit recovery under a state workmen's compensation law even though the decedent was engaged in a maritime occupation and the accident had occurred on a navigable body of water. Although the Court did not expressly overrule *Jensen*, *Jensen's* continuing vitality is open to serious question even in the field where it applies.

In *Davis*, the Court stated (317 U.S. 249 at 257):

> "We find here a state statute which purports to cover these persons, and which indeed does cover them if

the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 188, 191."

Therefore, as to injuries occurring in a maritime occupation, if there are sufficient contacts with the state, the employee may recover under the state statute rather than the Federal. See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, reh. den. 404 U.S. 1064, in which this Court held state rather than Federal maritime law applicable to a suit by a longshoreman involving an accident sustained on shore, noting that state law governs "where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks or other shore-based property." 404 U.S. at 209. Although the Court noted that the Admiralty Extension Act of 1948 (46 U.S.C. § 740) was enacted to "overrule or circumvent" that doctrine, that statute was intended to provide a Federal remedy, not to destroy remedies under state statutes. *Shell Oil Co.* v. *S.S. Tynemouth*, 211 F. Supp. 908, 910 (E.D. La. 1962); *Revel* v. *American Export Lines, Inc.*, 162 F. Supp. 279, 283 (E.D. Va.), aff'd 266 F. 2d 82; *Pet. of N.Y. Trap Rock Corp.*, 172 F. Supp. 638, 646 (S.D.N.Y. 1959).

Again, see *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, reaffirming the decision in *Davis*, and permitting the employee to sue his employer in the state courts for negligence, though the employer was covered by the Federal statute but had elected not to be covered by the state plan. Thus the reliance of the lower court on *Jensen* was

incongruous and betrayed a narrow, archaic view of the states' police power which has been discarded by this Court ever since *Olsen* v. *Nebraska*, 313 U.S. 236, and other decisions of more than a generation ago. The insistence of the lower court that *Jensen* is dispositive here is reminiscent of the insistence of the challengers of the state statute in *Ferguson* v. *Skrupa*, 372 U.S. 726, 728-730, that that case was governed by the long-since discredited *Adams* v. *Tanner* (244 U.S. 590).

In this connection it is well to note that 28 U.S.C. § 1333, conferring admiralty and maritime jurisdiction on the Federal courts, was enacted explicitly "saving to suitors in all cases all other remedies to which they are otherwise entitled." Under this statute the state and Federal courts have concurrent jurisdiction, *American Manufacturers' Mut. Ins. Co.* v. *Manor Investment Co.*, 286 F. Supp. 1007 (S.D.N.Y. 1968); *Chambers-Liberty Counties Naval Dist.* v. *Parker Bros. & Co.*, 263 F. Supp. 602, 605 (S.D. Tex. 1967), and absent clearly expressed Congressional language, an intent to divest the states of jurisdiction under their police power should not lightly be inferred.

The weight placed by the District Court on the Federal Limitation of Liability Act of 1853, 46 U.S.C. § 183, is inexplicable. That statute simply restricted the liability of shipowners to the extent of their investment in cases where the damage occurred without their knowledge. It in no way prevents states from enacting liability statutes of their own relating to damage within the state, and there is nothing in the Limitation of Liability Act which states otherwise. Over and above this, the materiality of that Act is highly questionable. It was enacted at a time when the protection and nurturing of this country's developing shipping industry was a vital interest, and environmental considerations as we know them today were undreamed of.

All this aside, this Court has consistently held that conflicts between Federal and state statutes should not be sought out simply because the Federal and state statutes

are not perfectly symmetrical. And the state's right to legislate on all subjects relating to the health, safety, and welfare of its citizens should not be restricted except where Congress has unmistakably voiced its intent to do so. *A. E. Nettleton Co.* v. *Diamond, supra,* 264 N.E. 2d 118, 27 N.Y. 2d 182, app. dism. *sub nom. Reptile Products Ass'n* v. *Diamond,* 401 U.S. 969; *Palladio, Inc.* v. *Diamond, supra,* 321 F. Supp. 630, aff'd 440 F. 2d 1319, cert. den. 404 U.S. 983, where the courts upheld the constitutionality of the New York endangered species statute even though the state law was more stringent than the Federal prohibitions.

The District Court here repeatedly begged the question whether the Florida statute was within the "admiralty jurisdiction." The act is, as we have shown, in fact not limited to seagoing vessels at all but applies to oil discharges from on-shore facilities, docks, drilling rigs, and barges and other sources concededly not within the Federal admiralty jurisdiction.* Here the state has plenary responsibility, consistently expressed by its Legislature, to protect its waters, harbors, wetlands and beaches from oil spills, over and above whatever remedies may exist under Federal law. The regressive, grudging view of the police power espoused by the District Court would leave the states remediless at a time of rapidly increasing threats to their shores.

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* Even assuming, *arguendo* only, that some conflict existed where vessels were involved, the District Court should have either declined to exercise jurisdiction until such issue was squarely before it, or, at most, and mindful of the statute's severability clause (§ 23), limited its decision to those portions of the act which relate to such vessels, leaving the remainder intact.

CONCLUSION

The decision of the District Court should be reversed, and the Statute declared to be constitutional in all respects.

Dated: New York, New York, June 9, 1972.

Respectfully submitted,

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APPENDIX

New York State Waterways Assn. v. *Diamond.*

Opinion, United States District Court, Western District of New York (Burke, D.J.).

Plaintiffs on July 13, 1971 filed an amended complaint asking for a declaratory judgment and injunctive relief. They ask this court to convene a three judge court pursuant to Section 2284 of Title 28, U.S.C., that Section 33-C of the Navigation Law of New York and the regulation promulgated, as applied to plaintiffs' watercraft, be declared unconstitutional in whole or in part, that the court enjoin temporarily and permanently the defendants, collectively and individually, from enforcing the provisions of Section 33-C of the Navigation Law, and particularly the criminal provisions thereof, and an injunction pending this suit.

This court fixed a date for a hearing on plaintiff's application for a preliminary injunction.

The defendants by notice of motion dated August 18, 1971 moved to dismiss the complaint on specific grounds stated, among which are that this court lacks jurisdiction over the subject matter, that the action is premature, and that this court should abstain from taking jurisdiction under the doctrine of equitable abstention. The motions came on for a hearing and oral argument. The respective parties have filed written memoranda.

Findings of Fact

1. Section 33-c of the New York Navigation Law was enacted by the New York State Legislature in 1966 (Laws of 1966, Chapter 897). It prohibits the placing, throwing, deposit or discharge into the waters of New York State,

from any watercraft, marine or mooring, of any "sewage or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." It prohibits the use of marine toilets on watercraft on the water of New York State "unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section." This provision went into effect March 1, 1970. The plaintiff contends that the statute is unconstitutional on the grounds that it conflicts with certain provisions of the Federal Water Quality Improvement Act and Water Pollution Control Act, creates an unconstitutional burden on interstate commerce, and is unconstitutionally vague and discriminatory.

2. This court declines to convene a three judge court as demanded in the complaint.

3. The plaintiffs do not sue for money damages, but only for a declaratory judgment and injunctive relief. They assert that this is a case involving also the admiralty and maritime jurisdiction of this court. Admiralty cannot give injunctive relief, Khedivial Line vs. Seafarers' Int. Union, 278 F.2d 49 (2 Cir. 1960); nor can it issue a declaratory judgment. This is not a case involving admiralty or maritime jurisdiction nor have the plaintiffs alleged any other valid basis for jurisdiction of this court. This court lacks jurisdiction over the subject matter of the suit.

4. The Federal Water Pollution Control Act, 33 U.S.C. Section 1151 et seq., does not evidence congressional intent to preempt this field or to exclude state action at this time.

5. There is no merit to the argument of the plaintiffs that the state is powerless to act to protect the health and

welfare of its residents during the period prior to the effectiveness of federal standards.

6. There is no merit to the claim of the plaintiffs that the statute constitutes an unconstitutional burden on interstate commerce.

7. There is no merit to plaintiffs' claim that Section 33-C could result in the impairment of contractual rights.

8. There is no merit to plaintiffs' claim that the provisions of Section 33-C permitting boarding and inspection of watercraft by state agents without a prior warrant constitutes a violation of the Fourth Amednment prohibition against warrantless searches. Moreover, none of the plaintiffs has been made the victim of an allegedly unconstitutional search nor has such a search been threatened, nor has the statute been enforced against any of them. When and if any plaintiff is prosecuted for violation of Section 33-C, and if that prosecution resulted from a search of its vessel without a warrant, it will then have an opportunity to raise its Fourth Amendment claims, if applicable, as a defense in a criminal prosecution.

9. Section 33-C fully complies with the constitutional requirements of due process and equal protection under the Fourteenth Amendment. Neither the complaint nor the amended complaint raises any substantial federal question.

10. Even if this court did have jurisdiction, it should abstain from exercising such jurisdiction in the circumstances of this case. Reetz vs. Bozanich, 397 U.S. 82; Zwickler vs. Koota, 389 U.S. 241. No state court has ever had an opportunity to interpret and construe the statute and procedures under attack here.

CONCLUSION OF LAW

1. Plaintiffs' motion for a preliminary injunction is denied. IT IS HEREBY SO ORDERED.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the complaint and the amended complaint herein are dismissed.

HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

January 12, 1972.